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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 426

JOHN KIRSCHKE, ET AL., *Appellants*

v.

THE CITY OF HOUSTON, *Appellee*

PETITION FOR REHEARING OF APPELLANTS' ON JUDGMENT OF DISMISSAL OF APPEAL

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John Kirschke, Sr., J. C. Dudley O'Fiel, Jr., Charlyne O'Fiel Mallory and husband, Brownie Mallory, and Mrs. Anna Morgan, a feme sole, Appellants in the above cause, respectfully file this their Petition for Rehearing of the Judgment of Dismissal of their Appeal entered by this Honorable Court on December 5, 1960, in which Judgment of Dismissal the Appeal was dismissed for the reason that the Judgment of the Supreme Court of Texas, sought here to be reviewed, is based upon a non-Federal ground adequate to support it.

It is truly inconceivable that citizens in this country could be deprived of the "lawful and legitimate use of their

property" by a governmental agency prior to a legal taking thereof without compensation and should go away from the Courts empty-handed.

The holding in the Judgment appealed from is that the City of Houston "by refusing such permit, is in effect illegally interfering with Appellants' property rights and a lawful and legitimate use of their property prior to a legal taking thereof". With this holding how can it be possible that Appellants have no Constitutional liberty and right which any Court in this land will recognize?

We respectfully urge upon this Honorable Court that it should carefully re-examine this case again and grant the Appeal, because it is fully worthy of Supreme Court consideration. This case involves the very foundation and basis of the right to private property under the Federal Constitution and its Amendments. It certainly is worthy of the time this Court would take to give it consideration in full hearing.

This Honorable Court in recent years has been the most alert and protective Supreme Court this Nation has ever had, when considering the freedoms and liberties pertaining to the person of the individual citizen. Should this Court not use the same degree of diligence and protection of property rights, which are "next in degree to the right of personal liberty". Is it true that the property of an individual may be taken for public use, and the individual denied the "lawful and legitimate use of their property", without just compensation? Can individuals be deprived of the "lawful and legitimate use of their property" in the interest of public economy without just compensation? If this is true, then Democracy and Liberty have died a

little in this new concept of governmental immunity. We ask this Court to consider the monumental and lasting effect of the refusal of this Appeal. This decision will be cited in the years to come as the basis of governmental immunity for any depredation on private property imaginable. It is complete victory for governmental immunity over private ownership of property.

We assure this Honorable Court that a violation of the Fourteenth Amendment is presented in this case. If this Court has not plainly seen the violation of Appellants' Constitutional rights under the Fourteenth Amendment, and other Amendments, it is because of our poor advocacy. We ask the Court to re-consider in the public interest. The case involves the Constitutional conflict as to whether under our system of government we can preserve the rights of ourselves as private individuals against the demands of our public selves en masse.

The judgment of the Supreme Court of Texas cannot be based upon any non-federal ground to support it, which is not in violation of the Federal Constitution.

We should point out at the out-set that the decision of the Supreme Court of Texas was merely a notation upon the Application of the Writ of Error "REFUSED. NO REVERSIBLE ERROR". This means that the Supreme Court of Texas did not approve of all of the legal findings of the Court of Civil Appeals. It merely means that the judgment of the Court of Civil Appeals in disposing of the case was correct. Rule 483 of the Rules of Civil Procedure for the State of Texas states in part:

> "In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "REFUSED. NO REVERSIBLE ERROR".

Therefore, we can only speculate as to the real ground upon which the Supreme Court of Texas entered its Judgment in refusing the Writ of Error. We only know the Supreme Court of Texas was not satisfied that the opinion of the Court of Civil Appeals correctly stated the law.

However, there are no grounds upon which the Supreme Court of Texas could have sustained the Judgment of the Court of Civil Appeals which would not be in violation of the Constitution of the United States of America and its amendments.

The grounds upon which the said Judgment of the Court of Civil Appeals were three in number, none of which could be valid as against Appellants' contention that the City of Houston had violated Appellants' rights under the Fourteenth Amendment to the Constitution of the United States, as depriving Appellants of their property without due process of law, and as constituting a taking of private property for public use without just compensation.

The grounds upon which the City of Houston was exonerated were as follows:

> 1. The Court of Civil Appeals held that taking of private property for public use requires physical appropriation, but this is not true under Federal Law

because the test under the Fourteenth Amendment is the impairment of value.

Chicago v. Taylor, 125 U.S. 161, 8 S. Ct. 820, 31 L. Ed. 630;
Portsmouth Harbor Land & Hotel Company v. United States, 260 U.S. 327, 67 L. Ed. 287.

2. The Court of Civil Appeals held that the doctrine of sovereign immunity overrides express constitutional guarantees. This holding is incorrect and the most ominous and disturbing error made by the Court.

Griswold v. Town School District (S. Ct. Vermont) Vt.____, 88 Atl. 2d 829;
and numerous cases cited therein.
McQuillin Municipal Corporations, Sec. 53.24, P. 204;
Municipal Corporations, 38 Amer. Jur. Par. 573, Page 265;
Eminent Domain, 18 Amer. Jur. Par. 145-774; and numerous cases cited thereunder;
Municipal Corporations, 63 C.J.S. 746, Page 30, and other cases cited on Page 34 of Appellants' Statement as to Jurisdiction.

3. The Court of Civil Appeals erred in refusing to hold that the abuse of police power is a violation of Constitutional guarantees. The opinion is conflicting and contradictory because it expressly holds that "in refusing the permit the City of Houston "has arbitrarily and unreasonably denied the permit." Certainly when police power has been excessive, unreasonable and arbitrary and diminishes the value of private property or its use, the police authority is not lawfully exercised, and constitutes a violation of property rights under the Fourteenth Amendment which entitles the damaged citizen to just compensation.

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (415, 67 L. Ed. 322), 326, 43 S. Ct. 158, 28 A.L.R. 1321;
United States v. Kansas City Life Insurance Company, 339 U.S. 799, 84 L. Ed. 1277, 70 S. Ct. 884;
United States v. Causby, 328 U.S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062.

We therefore see that Constitutional rights were violated under the Fourteenth Amendment to the Federal Constitution, when Appellants were not reasonably and justly compensated for the taking of their property.

There can be no justification of an unconstitutional act. There is no procedural or local law that can override the express guarantees of Constitutional rights; otherwise, why have a Constitution at all? If the taking of Appellants' property, and the interference with the lawful and legitimate use of the same, constituted a violation of Appellants' Constitutional rights under the Federal Constitution, such violation could not be justified upon any local or non-Federal ground which would disregard the Constitutional guarantees under the Federal Constitution.

We therefore respectfully submit to the Court that this case is a matter of great public importance and concern, and that if the case should be briefed at length and presented to the Court in oral argument, there is a great probability that this Court would not thereafter dismiss the Appeal, or affirm the decision of State Court, but on the other hand would reverse the judgment and vindicate the Constitutional rights of these Appellants who, accordingly, pray that this Honorable Court will

grant a rehearing on the Judgment of Dismissal, and that this Court will accept and note jurisdiction in this cause, and order this cause set down for hearing in order that the Constitutional questions of national importance could be determined by this Honorable Court in due order and procedure.

We certify that a copy of the foregoing statement as to jurisdiction has been served upon the Legal Department of the City of Houston by depositing same in the United States Mail with sufficient postage duly certified, addressed to the Honorable Homer T. Bouldin, Assistant City Attorney, City Hall, Houston, Texas, prior to the date of filing with the Clerk of the Supreme Court of the United States.

The undersigned, Bennett B. Patterson does further certify to this Honorable Court that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully submitted,

PATTERSON, McDANIEL & MOORE

By /s/_____

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